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No. 10-436

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

R.H., BY HIS PARENTS AND NEXT FRIENDS EMILY AND MATTHEW H.,

Petitioner,

v.

PLANO INDEPENDENT SCHOOL DISTRICT

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Questions Presented by Petitioner R.H. ("R.H.") misrepresent the actual facts of the case and the Fifth Circuit's decision. Respondent, Plano Independent School District ("PISD") therefore provides its own.

1. The Individuals with Disabilities Education Act ("IDEA") obligates school districts to provide an eligible child with a disability with a free appropriate public education. Under the IDEA, the educational program provided to a child with a disability must be individualized to meet his or her unique needs. Additionally, children with disabilities must be educated in the least restrictive environment ("LRE") to the maximum extent *appropriate*.

The proper question presented here is whether the IDEA's LRE mandate requires a public school district to place, at public expense, a child in a private preschool setting that has been considered and rejected as inappropriate given the child's individualized needs, without regard to the fact that the public school placement offered for the child does not segregate him, includes age-appropriate instruction alongside children who are not disabled, and meets his individualized needs.

2. Whether the Supreme Court should review a decision that affirmed the concurrent findings of the Fifth Circuit and Hearing Officer that PISD considered TLC, a private preschool ("TLC") as a placement option but correctly determined that PISD's educational placement for R.H. at Beaty Early Childhood School ("Beaty") was the LRE appropriate for him given his individualized needs.

3. Whether the Supreme Court should review a decision when there are alternative grounds to support judgment in favor of the Respondent.

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STATEMENT OF THE CASE

R.H.'s "Questions Presented" and "Statement" are both misleading and inaccurate, as shown in greater detail below. The Respondent School District ("PISD") adopts by reference the Factual Background and Procedural History as stated by the Fifth Circuit. (Pet. 63a-69a). This case arises under the Individuals with Disabilities Education Act ("IDEA") and involves whether R.H. was provided a free appropriate public education ("FAPE") by PISD. The gravamen of R.H.'s complaint arises from his belief that PISD did not offer R.H. a FAPE because it allegedly refused to consider and place him at TLC, a private preschool setting, which R.H. claims was the least restrictive environment. The Special Education Hearing Officer, Magistrate Court, District Court and Fifth Circuit all disagreed with R.H., holding that PISD provided R.H. with a FAPE, in the least restrictive environment at Beaty. (Pet. 10a, 18a-19a, 21a, 24a-25a, 41a-56a, 60a, 71a-79a, 81a, 84a).[1]

R.H.'s petition fails to acknowledge that his placement at Beaty was driven by his individualized needs, as set forth in his Individual Education Program ("IEP"). The December 10, 2004 Admission, Review and Dismissal ("ARD") Committee, which included R.H.'s parent, determined that R.H. was a student eligible for special education services under the IDEA under the classifications of Non-Categorical Early Childhood, with

1. R.H. did not include as part of the Appendix the District Court's Order Adopting the Magistrate Court's Report and Recommendation. However, the Final Judgment confirms that it was adopted through its affirmance of the Hearing Officer's decision. (Pet. 60a).

a suspicion of autism and speech impairment. (Pet. 6a-7a, 66a). It was determined that R.H. needed one-to-one instruction during transition period, a low student to staff ratio and small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. (Pet. 8a, 47a, 77a). R.H.'s parent was a full participant in the ARD Committee process and agreed with its determinations. (Pet. 8a).

R.H. was placed at Beaty, a preschool program with both typically developing peers and students with disabilities in attendance. (Pet. 9a). R.H.'s classroom placement offered him education alongside both disabled and non-disabled peers. (Pet. 9a-10a; 52a). The three-year old classroom that R.H. attended was small, with a maximum enrollment of twelve students, with an opportunity for six students with IEPS and six typically developing peers. (Pet. 9a-10a). The four-year old classroom provided for R.H. had a maximum enrollment of fifteen students, with an opportunity for six students with IEPS and nine typically developing peers. (Pet. 10a). All of the teachers at Beaty were special education certified. (Pet. 10a). Beaty also had speech and language pathologists, teaching assistants, occupational therapists and physical therapists on campus. (Pet. 10a). The classroom for R.H. at Beaty included one classroom teacher, one teaching assistant and a speech and language pathologist that came on alternating days. (Pet. 10a). The Hearing Officer determined that the presence of the SLP at Beaty was important for R.H. to receive individual instruction from the SLP because communication disorder is a hallmark characteristic of autism spectrum disorder; thus the SLP should be in

the classroom on a regular, daily basis for an extended period of time. (Pet. 13a). R.H.'s classroom teacher at Beaty and the SLP worked closely together. The occupational therapist on staff at Beaty also assisted with strategies for R.H.'s eating issues during lunchtime with his peers. (Pet. 20a).

PISD was aware of R.H.'s previous attendance at TLC and although it was considered as a placement option, it was rejected due to his individual needs. (Pet. 77a-78a, 15a, 25a). The Hearing Officer's findings demonstrated that TLC could not provide a setting that would meet his individualized needs. The teacher to student ratio for R.H. at TLC was high; approximately 2:26. (Pet. 10a, 20a). R.H.'s teacher at TLC did not have a college degree, was not certified in special education or licensed to teach in Texas public schools. (Pet. 10a, 20a). TLC did not have any occupational therapists or speech therapists on staff, and no occupational therapists were available to assist R.H. during lunch at TLC. (Pet. 10a, 20a). The ARD documents reflected that R.H.'s parents did not believe that the teachers at TLC were trained to recognize sensory issues that affect his participation at lunch. (Pet. 20a). There was no collaboration between the TLC teacher and the key stakeholders in R.H.'s education. (Pet. 20a). The TLC teacher testified that she did not interact with R.H.'s private service providers. (Pet. 20a). Accordingly, the Hearing Officer determined that Beaty was the least restrictive environment for R.H. (Pet. 18a-20a). The Magistrate Court, District Court and Fifth Circuit agreed. (41a-56a, 60a, 71a-79a, 81a, 84a).

The Hearing Officer, Magistrate Court and District Court all determined that: (i) PISD developed an IEP for R.H. that was individualized on the basis of his assessment and performance; (ii) PISD provided services in a coordinated and collaborative manner; (iii) PISD administered the program in the least restrictive environment; and (iv) R.H. demonstrated academic and non-academic benefits. (Pet. 16a-21a, 46a-56a, 60a).

R.H. attended Beaty for the spring of 2005, progressed and received meaningful benefit. (Pet. 21a, 49a-50a, 81a). However, his parents unilaterally removed him from PISD and enrolled him at TLC for the following 2005-2006 school year. R.H. subsequently initiated a due process hearing requesting in part[2] that PISD reimburse R.H. for the costs of his private school placement at TLC for the 2005-2006 school year. Because PISD developed an IEP that was reasonably calculated to provide R.H. with an educational benefit and provide him with a FAPE in the least restrictive environment, the Hearing Officer, Magistrate Court and District Court all denied R.H.'s request for reimbursement. (2a-36a, 37a-59a, 60a). The Fifth Circuit affirmed the underlying decisions in full, finding that the IEP developed by PISD for R.H. was reasonably calculated to provide him with educational benefit and provided him with a FAPE in the least restrictive environment in conformity with the IDEA. (Pet. 71a-81a).

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2. R.H. also requested reimbursement for Extended School Year Services for the summer of 2005 which was denied due to his failure to comply with the IDEA's statutory notice provision, 20 U.S.C. § 1412(a)(10)(C). Although R.H. did not discuss this issue in his petition, this remains an alternative basis to support the Fifth Circuit's decision as shown below.

REASONS FOR DENYING THE PETITION

I. R.H. PREDICATES HIS PETITION ON LEGAL ARGUMENTS THAT FAIL TO ACKNOWLEDGE THE ACTUAL FINDINGS OF THE CASE.

Whatever value may be thought to exist in the questions presented by R.H., this is simply not the case to address such inquiries. R.H. completely abandons any attempt to honestly address the facts of the case. Instead, the legal arguments framed by R.H. in his request for review rest entirely on misleading, unsubstantiated presumptions. Indeed, although R.H. makes several factual representations within his petition, he completely fails to cite *even a single time* to any actual findings within the record appendix to corroborate any of his allegations. (Pet. 1-25).

R.H. likely is not forthright with respect to the facts of the case because he is aware that disagreements with the evidence are insufficient grounds for Supreme Court review. The Supreme Court does not grant certiorari to review evidence or discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925). Review depends on numerous factors other than the perceived correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 2447 (1974). The Supreme Court will not grant a petition for writ of certiorari to review a decision on the grounds that the evidence was not sufficient to support the decision. *Southern Power Co. v. North Carolina Pub. Servs. Co.*, 263 U.S. 508, 509, 44 S.Ct. 164, 165 (1924). It is not warranted to grant a writ of certiorari to review evidence or inferences drawn from it. *General Talking Pictures*

Corp. v. Western Elec. Co., 304 U.S. 175, 178-89, 58 S.Ct. 849, 851 (1938). The Supreme Court Rules confirm that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. SUP. CT. R. 10. The Supreme Court therefore does not undertake to review findings of fact, in the absence of a very obvious and exceptional showing of error. *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 670, 87 S.Ct. 666, 670 (1967). Additionally, the fact that a question that might be hypothetical as to everyone else would be of great practical importance to litigants is ordinarily not a sufficient basis for granting certiorari. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S.Ct. 1359, 1362 (1994). By failing to squarely engage the underlying factual findings, R.H. presents a hypothetical case for review that would not even be pertinent to the litigants here if certiorari was granted.

Specifically, the Fifth Circuit did not agree, as R.H.'s petition presumes, that PISD failed to properly consider alternative placement options for R.H. outside of PISD. The Hearing Officer rejected R.H.'s allegation that the District failed to consider a continuum of placement options. (Pet. 15a, 25a, 35a). The Fifth Circuit agreed with this determination as being amply supported by the evidence, noting that PISD was aware of R.H.'s previous enrollment at TLC, but rejected it because of the needs identified in his IEP. (Pet. 77a-78a).

R.H.'s petition also falsely assumes that TLC is the regular educational environment. R.H. fails to inform the Court that the Fifth Circuit rejected this same argument, stating, "[h]]is class at Beaty, R.H. argues, is a "special education" setting, not a "regular" setting. It follows that PISD took "no steps to accommodate [him] in regular education," as required by the IDEA. We disagree." (Pet. 77a). The Magistrate Court's report, adopted in full by the District Court, also rejected R.H.'s argument that TLC was the "regular classroom" and Beaty was not, stating:

> The Court finds that neither the record nor applicable case law make such a bright line distinction. The classrooms in both schools had both disabled and non-disabled children in them – though the ratio of disabled to non-disabled may have differed. The Court finds that, however way Beaty is characterized, the District's plan provided R.H. with supplemental aids and services – one of which may have well indeed been the placement of R.H. in a classroom with both disabled and non-disabled peers where he could both model appropriate behaviors and receive the extra services, attention and therapies from trained care providers his disability merited – in the least restrictive manner. (Pet. 54a).

The concurrent findings by the Magistrate Court and Fifth Circuit on this issue are supported by the law. The Department of Education declined a recommendation that it add language to the language concerning preschool children in 34 C.F.R. §

300.320(a)(5) by replacing the term "regular educational environment" with the phrase "settings with typically developing peers," stating:

> Section 300.320(a)(5)...applies to all children with disabilities covered by Part B of the Act, which includes preschool children...We do not believe it is necessary to change the regulations in the manner suggested by the commentator *because the 'regular class' includes a preschool setting with typically developing peers.*

Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46666 (Aug. 14, 2006) (codified at 34 C.F.R. pt. 300) (emphasis added).

The Department of Education also rejected recommendations to replace the term "regular education environment" with the term "regular classroom" in 34 C.F.R. § 300.114(a)(2)(ii), stating "regular educational environment encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." 71 Fed. Reg. at 46585. The Department of Education refused to define "regular educational environment" to mean the regular classroom and the non-academic environment, stating it was unnecessary because:

> The LRE requirements in §§ 300.114 through 300.120, consistent with section 612(a)(5) of the Act, are clear that each public agency must ensure that, to the maximum extent appropriate, children with disabilities are

> educated with children who are nondisabled. 71 Fed. Reg. at 46585.
>
> The Department of Education further instructed:
>
> We believe that the LRE requirements in §§ 300.114 through 300.120 address the rights of children with disabilities to be educated in the LRE, as well as safeguard parental rights. Section 300.114, consistent with Section 612(a)(5) of the Act, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 71 Fed. Reg. at 46585.

The Office of Special Education Programs acknowledged that neither the IDEA nor its implementing regulations define the term "regular classes" but noted that the IDEA establishes a presumption that children with disabilities will be educated in classes and setting with their nondisabled peers unless the education of children with disabilities cannot be satisfactorily achieved in those classes and settings with the use of supplementary aids and services. *Letter to Anonymous*, 104 LRP 1253, Office of Special Programs (July 23, 2003). However, the Office of Special Programs declined to agree that a "hybrid classroom," containing a percentage of disabled children greater than the natural percentage of disabled children in the general population of the school district was not a "regular class," concluding instead that "the IDEA does not limit the number, or percentage, of students with

disabilities that may be placed into a specific regular classroom in order to provide a free appropriate public education in the least restrictive environment." *Id.*

The guidance from the Department of Education and Office of Special Education Programs should be dispositive on this point. The IDEA authorizes the United States Department of Education, through its Office of Special Education Programs, to administer and carry out the IDEA, and charges the Secretary to enact the necessary regulations to ensure compliance with the IDEA and issue interpretations of its regulations. 20 U.S.C. § 1402(a); 20 U.S.C. § 1406. Reviewing courts must accord substantial deference to an agency's interpretation of its own regulations, giving it controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513, 114 S.Ct. 2381, 2386 (1994); *Irving v. Tatro*, 468 U.S. 883, 892, 104 S.Ct. 3371, 3373 (1984). In this case, R.H. cannot dispute that his placement at Beaty provided age-appropriate instruction alongside typically developing peers. R.H.'s petition thus presents a false case for review by assuming that TLC, and not Beaty, was the regular educational environment. The Magistrate Court and Fifth Circuit disagreed, and R.H. offers no facts or pertinent authority to the contrary that would merit Supreme Court review.

R.H. also misrepresents the case in alleging that the Fifth Circuit refused to apply a mainstreaming analysis, or otherwise limited its analysis to only public school settings, to the exclusion of TLC. A review of the Fifth Circuit's analysis easily dispels this misrepresentation. (Pet. 71a-81a). R.H. offers absolutely no citation to the

record to prove that the findings below were obviously and exceptionally erroneous or plainly without support to allow for Supreme Court review. At best, R.H.'s false presumptions only establish his personal disagreement with the factual findings of the Hearing Officer, Magistrate Court, District Court and Fifth Circuit. The Hearing Officer's factual findings in favor of PISD were affirmed by the Magistrate Court, the District Court, and the Fifth Circuit. (Pet. 41a-56a, 57a, 71a-79a, 81a, 84a). It is long-settled that concurrent conclusions of two courts below on the facts are accepted by the Supreme Court and will not ordinarily be disturbed. *Thomas v. Kansas City Southern Ry. Co.*, 261 U.S. 481, 484, 43 S.Ct. 440, 441 (1923); *Piedmont & George's Creek Coal Co v. Seaboard Fisheries Co.*, 254 U.S. 1, 12, 41 S.Ct. 1, 13 (1920). The Petition for Writ of Certiorari should be denied.

II. THE FIFTH CIRCUIT'S DECISION AROSE FROM A REVIEW OF R.H.'S INDIVIDUALIZED NEEDS, WHICH R.H. CANNOT DISPUTE.

The Fifth Circuit's holding that PISD provided an appropriate public placement for R.H. did not originate from a refusal to conduct a mainstreaming analysis or consider TLC as an option simply because it was a private preschool. Supreme Court review is not compelled here because the decision not to place R.H. at TLC arose from his individualized needs, as set forth in his IEP. (Pet. 8a, 47a, 77a). R.H.'s individualized needs cannot be ignored. The IDEA's LRE provision makes this explicit, directing that the educational placement of a child with a disability must be *appropriate*. 20 U.S.C. § 1412(a)(5)(A). In *Daniel R.R. v. State Bd. of Educ.*,

874 F.2d 1036 (5th Cir. 1989), the Fifth Circuit recognized that the requirement to provide a LRE does not supersede the District's obligation to provide each student with a FAPE, stating, "the Act's mandate for a free appropriate public education *qualifies* and *limits* its mandate for education in the regular classroom." *Daniel R.R.*, 874 F.2d at 1045 (emphasis added).

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services *designed to meet their unique needs* and prepare them for employment and independent living. 20 U.S.C. § 1400(d)(1)(A) (emphasis added). To satisfy this purpose, schools are required to identify children with disabilities and develop an IEP for each child. 20 U.S.C. § 1414. The IDEA defines FAPE as special education and related services that: (i) have been provided at public expense, under public supervision and direction and without charge; (ii) meet the standards of the State educational agency; (iii) include an *appropriate* preschool, elementary or secondary school education; and (iv) are provided *in conformity with the individualized education program developed*. 20 U.S.C. § 1401(9) (emphasis added). "Special education" means *specially designed instruction*, at no cost to parents, to meet the *unique* needs of a child with a disability. 20 U.S.C. § 1401(29) (emphasis added). A child receives a FAPE when the program: (i) address the child's unique needs; (ii) provides adequate support services so the child can take advantage of educational opportunities; and (iii) is in accord with the IEP. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S.

176, 188-189, 102 S.Ct. 3034 (1982). The IEP is therefore the "centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597-98 (1988).

To accept R.H.'s argument here would impermissibly disregard his IEP and the individual needs it addressed. The Hearing Officer determined that R.H.'s placement at Beaty for the spring 2005, along with the proposed educational program for the 2005-2006 school year was appropriate and individualized on the basis of his assessment and performance. (Pet. 18a). R.H.'s IEP determined that he needed one-to-one instruction during transition periods, a low student to staff ratio and small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. (Pet. 8a, 47a, 77a). The Magistrate Court and District Court agreed that the IEP was appropriately individualized. (Pet. 46a-48a). It was these individual needs that led to the determination that Beaty, not TLC, was the least restrictive environment appropriate. (Pet. 18a-20a, 46-55a, 78a).

R.H. cannot dispute these facts now. The Fifth Circuit noted that nothing in R.H.'s briefing could be construed as challenging the District Court's finding that PISD satisfied the requirement that his IEP be developed to meet his individualized needs with services to be provided in a coordinated and collaborative manner by the key stakeholders. (Pet. 75a). R.H. therefore cannot now contest the sufficiency of the IEP or the individualized needs stated therein. The Supreme Court is a court of final review, not first view. *Fed.*

Communication Comm'n v. Fox Television Stations, Inc., __ U.S. ___, 129 S.Ct. 1800, 1819 (2009) (holding that when the Circuit Court did not rule on the constitutionality of the Commission's orders, the Court would not entertain a request by the respondents to decide their constitutional validity). When a question or issue is not raised below, it is not open for consideration in proceeding on petition for certiorari. *Ellis v. Dixon*, 349 U.S. 458, 460, 75 S.Ct. 850, 852 (1955). These factual findings should also be accepted by the Supreme Court as they were concurrently confirmed by the Magistrate Court, District Court, and Fifth Circuit. (Pet. 41a-57a, 71a-79a, 81a, 84a).

The Fifth Circuit directly disagreed with R.H.'s contention that PISD had not considered placing R.H. at TLC; discussing that the basis for its rejection as a placement option arose from R.H.'s individual needs as set forth in his IEP. (Pet. 77a, 78a). The Fifth Circuit explained:

> The picture that emerges from the due-process hearing transcript is of an ARD committee marshaling a range of resources and services to ensure R.H. a free appropriate public education. As the IEP developed, it seemed apparent to the committee members–including R.H.'s mother–that the best place to implement the plan was at Beaty. The ARD Committee was well aware of R.H.'s previous experience in private preschool, but considering all his newly identified needs and newly offered resources, the committee did not recommend

> that he continue at TLC. The Hearing Officer thus concluded that R.H. had not met his burden to prove PISD failed to consider a full continuum of placement options. (Pet. 78a).

The Fifth Circuit agreed with the Hearing Officer and District Court's determination on this issue, finding no clear error. (Pet. 78a).

R.H. thus misrepresents the reasoning behind the Fifth Circuit's decision. R.H. postures this case as one of great importance because the Fifth Circuit refused to apply a mainstreaming analysis for R.H., a preschool child. Even a cursory review of the decision reveals that the Fifth Circuit carefully applied the mainstreaming analysis in the full context of determining whether PISD's offered educational program for R.H. provided him with a free *appropriate* public education. (Pet. 71a-81a). The Fifth Circuit did not, as R.H. misrepresents, deny R.H.'s requested relief because it either refused to conduct a mainstreaming analysis or made a blanket determination that a private school program could never serve as an appropriate placement for a preschool child.

Nothing within the Fifth Circuit's decision establishes the precedent suggested by R.H. The Fifth Circuit's ancillary discussion of private school placements only rejected R.H.'s "rigid interpretation" of *Daniel R.R.* and was limited to the facts of the case, stating, "[w]e do not read *Daniel R.R.* to flip the default of the IDEA in favor of a private school placement *in this case*." (Pet. 80a) (emphasis added). Indeed, the Fifth Circuit's disagreement with R.H.'s assertion that TLC must be the default regular educational environment in

this case only came *after*[3] it undertook a full analysis of R.H.'s individualized needs and determined that not only had PISD satisfied step one of the *Daniel R.R.* analysis[4] but also found no clear error in the Hearing Officer and District Court's findings that PISD had not violated either the procedural or substantive requirements of the IDEA. (*Compare* Pet. 71a-79a with 79a-80a). The Petition for Writ of Certiorari should be denied.

III. THERE IS NO SPLIT AMONGST THE CIRCUIT COURTS.

R.H. attempts to manufacture a split amongst the Circuit Courts that does not exist on the facts of this case. The split that R.H. suggests exists between the Fifth Circuit and the Third, Seventh and Tenth Circuits presumes that these other Circuit Courts have adopted a rigid test favoring private placement when preschool children are involved. This argument ignores that each of the cases from the Third, Seventh and Tenth Circuits cited by R.H. arrived at a decision that private placement

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3. Only after finding that PISD satisfied step one of *Daniel R.R.* and that there was no clear error in the underlying decisions, did the Fifth Circuit go on to say, "[w]e disagree, moreover with R.H.'s rigid interpretation of *Daniel R.* step one..." (Pet. 79a).

4. The Fifth Circuit determined that R.H. failed to alternatively argue that PISD had failed step 2 of the *Daniel R.R.* analysis. (Pet. 80a). R.H. cannot present it now as a basis for Supreme Court review. *See Rogers v. Lodge*, 458 U.S. 613, 628, 102 S.Ct. 3272, 3281 (1982) (stating that the Supreme Court does not consider contentions that are not raised before a court of appeals and consequently not addressed by that court).

was appropriate only after carefully analyzing the individual needs of the student. None of these Circuit Courts suggested a blanket rule that private placement must be considered as the regular educational environment or otherwise provided for preschool children, without regard to their particular needs. The nonexistence of any conflicting blanket rule is best demonstrated by the fact that both the Third and Tenth Circuit have considered preschool placements since the rendition of the decisions cited by R.H., and upheld public preschool placements for children with disabilities over private preschool placements. *See Sytsema ex. rel. Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008); *M.S. v. Mullica Tp. Bd. of Edu.*, 263 Fed. Appx. 264 (3rd Cir. 2008).

Federal Circuit Courts recognize that the LRE analysis is necessarily fact-intensive, requiring careful analysis of the particular child's needs and abilities. *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 448 (9th Cir. 2010); *P. v. Newington Bd. of Ed.*, 546 F.3d 111, 119 (2nd Cir. 2008); *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1277 (10th Cir. 2007); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3rd Cir. 1993); *Daniel R.R.*, 874 F.2d at 1048. This analysis arises from the direct text of the IDEA requiring an IEP designed to meet a child's unique needs in an appropriate placement. *See* 20 U.S.C. §§ 1401(29); 1412(a)(5); 1414(d); The Department of Education confirms this approach as well. 71 Fed. Reg. at 46587 (instructing that placement decisions must be made on an individual basis and the requirement for the continuum of alternative placements "reinforces the importance of the individual inquiry, not a 'one size fits all' approach in determining what placement is the LRE for each child with a disability.").

The fact-specific inquiry employed by courts proves that the fundamental distinctions that exist between the case at bar and the authorities cited by R.H. do not create any conflicts that merit Supreme Court review. These cases are distinguishable. R.H.'s citation to *T.R. v. Kingwood Township*, 205 F.3d 572 (3rd Cir. 2000), fails to inform the Court that this decision was rendered prior to the United States Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005), and placed the burden of demonstrating compliance with the IDEA on the school district. *See L.E. v. Ramsey Bd. of Edu.*, 435 F.3d 384, 391 (3rd Circuit 2006). The Third Circuit subsequently recognized its prior application of the burden of proof in *Kingwood Township* and specifically rejected continued placement of the burden upon school districts in light of the *Schaffer* decision. *L.E.*, 435 F.3d at 391.

Regardless, the basis for finding error and remanding the underlying district court's decision for further consideration in *Kingwood Township* rested with the fact that the district court did not address the student's specific needs, there was no evidence that the student could not have been educated satisfactorily in a "fully-mainstreamed" preschool class, and the district court did not inquire into whether appropriate regular classroom options outside the school district were available. *Id.* at 578-580. This case has widely different facts. TLC was considered by both the school district and the hearing officer, but given R.H.'s individual needs, as set forth in his IEP, Beaty was determined to be the LRE appropriate. (Pet. 18a-20a, 46-55a, 78a).

Kingwood Township actually refutes R.H.'s central argument. In *Kingwood Township*, the Third Circuit held that the school satisfied its burden to establish that the placement of the student in a "hybrid" preschool program composed of half students with disabilities and half students without disabilities provided a FAPE. *Kingwood Township*, 205 F.3d at 577. The Third Circuit cited to *Florence County Sch. Dist. v. Shannon Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993), and held that *Shannon Carter* did not require reimbursement where both the state-chosen school and the parent-chosen school would provide a FAPE, even when the parent-chosen school would arguably provide a less restrictive environment. *Kingwood Township*, 205 F.3d at 581-82. The Third Circuit stated:

> Extending *Florence* to these circumstances would require a state to ensure the maximally optimal LRE placement for each child, even if such a placement is not available in any qualifying school within a reasonable distance. *Florence's* own language forecloses such an interpretation. *Florence* gives parents the right to reimbursement for a unilateral placement in a non-qualifying school only 'if a federal court concludes both that the *public placement violated IDEA* and that the private school placement was proper under the Act. *Id.*

The Third Circuit further held that the public school district did not even have to consider placement in the private preschool, Rainbow Rascals, because it was not properly accredited under New Jersey law. *Kingwood Township*, 205 F.3d at 580. Additionally, the school

district in *Kingwood Township*, did not offer a regular preschool program for non-disabled children. *Kingwood Township*, 205 F.3d at 576. The Court in *Kingwood Township* also determined as a substantive matter that the private program could have provided a FAPE to the student in question, which is not consistent with the Hearing Officer's findings regarding R.H.'s individualized needs and TLC's deficiencies. (Pet. 18a-20a); *Kingwood Township*, 205 F.3d at 580. Additionally, R.H. fails to acknowledge that the Third Circuit in *Kingwood Township* agreed that the IDEA did not contemplate an all-or nothing educational system in which children with disabilities attend either regular or special education. *Kingwood Township*, 205 F.3d at 579.

R.H. also claims that this case conflicts with the Seventh Circuit's decision in *Board of Edu. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Edu.*, 184 F.3d 913, 916-917 (7th Cir. 1999). This case is similarly distinctive, and not conflicting. In *LaGrange*, the school district recommended placing the student in a program limited to disabled students, in a different school district. *LaGrange*, 184 F.3d at 913. The second program offered by the school district for placement was an "at-risk program" for students at risk of academic failure. *Id.* The Seventh Circuit agreed that these placements did not constitute the least restrictive environment, particularly considering the deference owed to the underlying hearing officer's conclusion that the individual needs of the student could be met in a lesser restrictive environment. *LaGrange*, 184 F.3d at 916-917. Here, R.H. was not offered a program limited only to disabled students or at-risk students, nor did the Hearing Officer agree that R.H.'s individual needs could be met at TLC. (Pet. 18a-20a).

In *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004), the facts demonstrated that the public school placement consisted of a predominately disabled and gender-imbalanced student body such that it would have been an inappropriate placement for the female student at issue given her need to improve her social skills. *Nebo*, 379 F.3d at 973. The facts in the record in *Nebo* also established that the private school was better suited to meet the student's behavioral and social needs. *Nebo*, 379 F.3d at 978. The facts in this case are dissimilar, and any complaint that R.H. may wish to contest with the factual findings that PISD's placement of R.H. at Beaty was the LRE appropriate given his individual needs is simply unworthy of further review by the Supreme Court. There is no split here; each of the cases that R.H. claims conflict with this case cited favorably to *Daniel R.R.* and utilized the sane two-part test enunciated by the Fifth Circuit there. *See Kingwood Township*, 205 F.3d at 579; *Nebo*, 379 F.3d at 977; *LaGrange*, 184 F.3d at 915. Nor did the case at bar overrule the Fifth Circuit's *Daniel R.R.* test; it directly applied it in determining that PISD had satisfied the LRE mandate. In sum, R.H.'s alleged inter-circuit conflict is more illusion than substance, at least as it concerns this case. The Petition for Writ of Certiorari should be denied.

IV. R.H.'S ARGUMENT, IF ACCEPTED, WOULD INVADE PISD'S SOVEREIGN IMMUNITY AND VIOLATE THE SPENDING CLAUSE.

R.H. asks the Court to define private schools as the "regular educational environment" for preschool children, thus requiring public school districts to place preschool children in private schools and be liable for

the private preschool expenses unless it can otherwise prove that "removal" into the public school system is justified. This argument seeks to overturn the narrow rules of construction regarding waivers of sovereign immunity and further turn the Spending Clause presumption on its head.

The IDEA is a waiver by the government of its sovereign immunity. Any waiver of sovereign immunity must be strictly construed in favor of the governmental entity. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135, 112 S.Ct. 515, 520 (1991). The Supreme Court recognizes that "[l]ike a waiver of immunity itself, which must be unequivocally expressed... this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 160-61, 101 S.Ct. 2698, 2701-02 (1981). A waiver of sovereign immunity must therefore be unequivocally expressed, with all uncertainties resolved in favor of the governmental entity. *Boehms v. Crowell*, 139 F.3d 452, 463 (5th Cir. 1998). The Supreme Court acknowledged the limited nature of the waiver of sovereign immunity under the IDEA, ruling that a waiver of immunity under the IDEA must be made knowingly, such that any conditions imposed upon a governmental entity be unambiguous. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 294-304, 126 S.Ct. 2455, 2459-2464 (2006).

The Supreme Court repeatedly emphasizes that when Congress places conditions on the receipt of federal funds, it must do so unambiguously. *Pennhurst*

State School and Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793 (1987); *New York v. United States*, 505 U.S. 144, 158, 112 S.Ct. 2408 (1992). A law that conditions an offer of federal funding on a promise by the recipient "amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989 (1998). Accordingly, the "legitimacy of Congress' power to legislate under the spending power ... rests on whether the State voluntarily and knowingly accepts the terms of the contract. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 415 U.S. at 17. (citations omitted). In *Rowley*, the Supreme Court recognized that Congress did not intend to impose upon the States a "burden of unspecified proportions and weight" in enacting the IDEA. *Rowley*, 458 U.S. at 190, 102 S.Ct. at 3042.

The IDEA was enacted by Congress pursuant to the Spending Clause. U.S. CONST., ART. I, §8, CL. 1; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In *Murphy*, the Supreme Court repeated these rules of construction, ruling that since the IDEA was enacted pursuant to the Spending Clause, any conditions imposed upon the acceptance of federal funds must be spelled out unambiguously and that States could not be held to knowingly accept conditions of which they were unaware or unable to ascertain. *Murphy*, 548 U.S. at 296, 126 S.Ct. at 2459. The central inquiry for the *Murphy* Court was whether the IDEA furnished a state official deciding whether to accept IDEA funds with

notice that one of the obligations imposed upon such acceptance would be the obligation to compensate prevailing parties for expert fees. *Id.* In *Murphy*, the Supreme Court rejected the argument that expert fees should be interpreted to be part of the costs that could be recovered under 20 U.S.C. § 1415(i)(3)(B), concluding that neither the plain language of the IDEA, nor the Court's previous rulings on the meaning of the term "costs" could provide the clear notice required to attach such a condition to the receipt of IDEA funds. *Murphy*, 548 U.S. at 294-304, 126 S.Ct. at 2459-2464.

To agree that a public school district must consider a private preschool as the regular educational environment and place a child at a private preschool at public expense unless it can first justify "removal" into the public school system would violate the Spending Clause of the United States Constitution, and step outside the strict construction when sovereign immunity is at stake. *Murphy*, 548 U.S. at 294-304, 126 S.Ct. at 2459-2464 (2006). Neither state nor federal law notifies school districts that a condition of accepting federal funds under the IDEA includes the obligation to first consider private placements for preschool children, without regard to whether an appropriate public placement exists. Neither state nor federal law notifies school districts that for preschool children, the "regular educational environment" is the private preschool chosen by the parents or that the public school should be considered "separate schooling." Neither state nor federal law notifies school districts that for preschool children, a private placement must be made if it can purportedly offer a lesser restrictive environment, even if it is not appropriate for the individualized needs of the student.

The IDEA's provisions do not unambiguously and clearly place school districts on notice that R.H.'s arguments here are correct. In fact, the IDEA informs school districts that they are not required to pay for the cost of education for a child with a disability if that agency made a FAPE available to the child and the parents elected to place him in a private school. 20 U.S.C. § 1412(a)(10)(C)(i). Congress also expressly found that one of the Act's purposes was to address the fact that prior to its enactment, "children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2)(B). Congress further noted that prior to the Act, "a lack of adequate resources within the public school system forced families to find services *outside* the public school system." 20 U.S.C. § 1400(c)(2)(D) (emphasis added).

Congress' intent in promoting public placements for children with disabilities extends back more than forty years. In *Rowley*, the Supreme Court reviewed the legislative history, noting that Congress first addressed the problem of educating children with disabilities through grant programs enacted in 1966, and again in 1970. *Rowley*, 458 U.S. at 180, 102 S.Ct. at 3037; *see also* Pub. L. 89-750, § 160, 80 Stat. 1204; Pub. L. 91-230, 84 Stat. 175. The Supreme Court noted that neither of these two Congressional enactments contained specific guidelines for state use of the grant money and consequently was dissatisfied with the progress made. *Id.* In 1974, Congress was motivated to bring access to a public education for children with disabilities and therefore greatly increased federal funding, requiring for the first time that recipient States "adopt a goal of providing full educational opportunities to all

handicapped children." *Id.*; *see also* Pub. L. 93-380, 88 Stat. 579, 583. Following a comprehensive review of Congressional enactments, the Supreme Court found that "the face of the statute evinces a congressional intent to bring previously excluded handicapped children *into* the public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child. *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042. (emphasis added).

The Supreme Court has also noted the preference for public school placement. *Town of Burlington v. Dep't. of Edu.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002 (1985) (stating the IDEA therefore "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible."); *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042 ("[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that 'mainstreaming preference' has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors educational progress of the child.").

Circuit Courts similarly deny that parents have a right to services to be provided at a private school. *See KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1049-1050 (9th Cir. 1999) (finding that every Circuit Court that had considered whether the IDEA required services to be

provided on site at a private school concluded that it had not); *Foley v. Special Sch. Dist.*, 153 F.3d 863, 865 (8th Cir. 1998) (holding that the parents had no right to a federal decree that services be provided at a particular location); *Cefalu v. East Baton Rouge Parish Sch Bd.*, 117 F.3d 231, 233 (5th Cir. 1997) ("We therefore hold unambiguously that the defendants were not legally obligated to provide an on-site language interpreter to the plaintiff at the private school.").

These legal authorities not only demonstrate that there is no clear and unambiguous notice that R.H.'s arguments are correct, but also corroborate the accuracy of the Fifth Circuit's statements in rejecting R.H.'s argument that TLC was the default placement here. The Petition for Writ of Certiorari should be denied.

V. THERE ARE ALTERNATIVE GROUNDS TO SUPPORT THE FIFTH CIRCUIT'S JUDGMENT IN FAVOR OF PISD.

It is well-settled that a prevailing party may advance any ground before the Supreme Court in support of a judgment in his favor. *Trans World Airlines, Inc. v. Air Line Pilots Ass'n, International*, 469 U.S. 111, 105 S.Ct. 613, 621 (1985); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 1156 (1970). Because the lower proceedings all concluded that R.H. was not entitled to reimbursement for his placement at TLC for the 2005-2006 school year because PISD offered him a FAPE in the least restrictive environment, there was little reason for the Hearing Officer or reviewing courts to expand their holdings with additional reasons as to why relief

should be denied. However, there are alternative grounds to support the Fifth Circuit's decision, making Supreme Court review even more unnecessary.

A. TLC was not appropriate for R.H.'s individualized needs.

Parents who remove their child from a public school without the school district's consent do so at their own financial risk, such that parents are entitled to reimbursement *only* if (i) the public placement violated the IDEA, and (ii) the private school placement was proper under IDEA. *Town of Burlington*, 471 U.S. at 369, 105 S.Ct. at 2002-2003. Every LRE analysis requires a placement determination qualified by appropriateness. 20 U.S.C. § 1412(a)(5)(A). In assessing what constituted the LRE for R.H., the Hearing Officer reviewed his individual needs and whether they could be met at both Beaty and TLC. (Pet. 18a-20a). The Hearing Officer did not accept R.H.'s argument that TLC was the LRE, ruling instead that in light of R.H.'s needs, Beaty was the appropriate placement in the LRE. (Pet. 20a). The Hearing Officer's decision on this point was affirmed by all courts below. (Pet. 46a-55a, 60a, 78a). Even assuming, *arguendo*, that PISD's placement for R.H. at Beaty could be considered inappropriate, R.H. cannot demonstrate from the facts in the record that he would be able to satisfy the second *Burlington* prong so as to be entitled to any reimbursement. The Petition for Writ of Certiorari should be denied.

B. PISD offered R.H. dual enrollment.

R.H. also fails to acknowledge that he was offered the option of dual enrollment at both Beaty and TLC, but it was refused. (Pet. 13a). Texas law grants parents of an eligible student ages three or four the right to "dual enroll" their student in both a public school and a private school beginning on the student's third birthday and continuing until the end of the school year in which the child turns five, or until the student is eligible to attend a district's public school kindergarten program, whichever comes first. 19 TEX. ADMIN. CODE § 89.1096(c). The dual enrollment option permits the ARD committee to determine which special education and/or related services will be provided to the student and the location where those services will be provided, consistent with the requirements concerning placement in the LRE. *Id.* PISD offered this dual enrollment option to R.H., which would allow R.H. to access any of the services in his IEP at Beaty, at public expense, while still permitting him to attend school at a private school of his choice, such as TLC, at parental expense. As a three-year old student with a disability, he is entitled to receive special education at public expense. However, nothing in the law requires school districts to pay for other education or services outside of those identified as necessary in his IEP. *See* 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34. Thus, the option of dual enrollment must also be considered when assessing whether PISD provided R.H. with a FAPE in the LRE. The offer of dual enrollment further demonstrates that Supreme Court review is unnecessary. The Petition for Writ of Certiorari should be denied.

C. R.H. did not comply with the IDEA's statutory notice requirement.

The IDEA limits the circumstances in which parents who have unilaterally placed their child in a private school are entitled to reimbursement for that placement. 20 U.S.C. § 1412(a)(10)(C). Reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). That notice can be provided either "at the most recent IEP meeting that the parents attended *prior* to removal of the child from the public school" or by written notice ten business days *prior* to such removal. 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (emphasis added). The purpose of the statutory notice requirement is to give public school districts the opportunity to provide a FAPE *before* a child leaves public school and enrolls in private school. *Patricia P. v. Bd. of Edu.*, 203 F.3d 462, 468 (7th Cir. 2000) (emphasizing the importance of cooperation between parents and the school district before the child is removed from public school). Here, R.H. did not request an ARD committee meeting, nor did he notify PISD in writing of the intent to enroll at TLC and subsequently seek reimbursement. Only well after R.H. was unilaterally removed from PISD and enrolled at TLC, did R.H.'s parents request an ARD Committee meeting. (Pet. 11a-12a). By this point in time, R.H.'s parents were insisting upon an IEP that placed R.H. at TLC, and further stated to PISD that they would not remove him from TLC until an agreement could be made regarding his IEP. (Pet. 12a).

Here, the Hearing Officer exercised her discretion and denied reimbursement for the summer 2005 placement of R.H. at TLC because of the parents' failure to comply with the IDEA's statutory notice requirement. (Pet. 23a). The District Court and Fifth Circuit upheld the denial of reimbursement based on the failure to provide the statutorily required notice, holding that it was not an abuse of discretion. (Pet. 56a-57a, 82a-83a).

The Hearing Officer had no need to further rely upon this notice requirement as a basis to deny further reimbursement because she held that PISD had proposed an appropriate educational placement for R.H. for the 2005-2006 school year. (Pet. 24a). However, the parents' unilateral removal and subsequent refusal to return R.H. from TLC or consider any IEP that did not include R.H.'s placement at TLC, at PISD expense, effectively denied PISD of any meaningful opportunity to resolve the parents' concerns prior to removal. The Supreme Court recently noted that when a school district is determined to have failed to provide a FAPE, courts must consider all relevant equitable factors, including the notice provided by the parents in determining whether reimbursement for private placement is warranted. *Forest Grove Sch. Dist. v. T.A.*, __ U.S. __, 129 S.Ct. 2484, 2496 (2009). Here, a review of the equities should establish that the parents' unilateral removal and subsequent refusal to meaningfully consider any other placement for R.H. beyond publicly funded placement at TLC is contrary to the purpose of the IDEA's notice provision and justifies an alternative denial of reimbursement pursuant to 20 U.S.C. § 1412(a)(10)(C). The Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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